when there are, or may be, persons interested in the trust who are not before the court, or if before it, not competent to act for themselves;[18] or where the trust remains an active trust;[19] or where, though all the parties are *sui juris* and consent, it yet is evidenced that the intention of the trustor, or some legislative policy, may be thwarted if the trust is not continued.[20]

M. H. V. G.

QUASI-CONTRACTS: BLOOD RELATIONSHIP: THE PRESUMPTION OF GRATUITOUS SERVICES BY RELATIVES.—Ordinarily, the law will imply a promise to pay for services rendered and accepted. The rule is founded upon a presumption and may be rebutted by proof of a special agreement to pay either a particular amount or in a particular manner; or by proof that the services were intended to be gratuitous, either as an express gift or under circumstances from which the law will raise the counter presumption that the services were not intended to be a charge against the party who was benefited thereby.[1] Among the several exceptions to the general rule are those cases of services rendered by members of a family, including near and distant relatives to a certain degree, connected either by consanguinity or affinity, who are residing under one roof.[2] In such cases the law will not imply a promise of compensation for certain services rendered; the reason being that there exists a domestic relationship, the incidents of which include an exchange of such gratuities.

Therefore, whenever this domestic or family relationship exists, the usual presumption of payment for services rendered is negatived. An examination of the authorities will show that the emphasis is put on this family relationship rather than on blood relationship.[3] It is clear that volunteer services may exist, as well between strangers as between blood relatives, but unless they are living together there should be no presumption of gratuities in either case.[4] Yet, in *Gopcovic v. Gopcovic*,[5] the court said: "Indeed, it may well be doubted whether the plaintiff's evidence, if uncontradicted, would have constituted a contract

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[18] Thurston, Petitioner (1891) 154 Mass. 596, 29 N. E. 53; Harris v. Harris (1903) 205 Pa. St. 460, 55 Atl. 30; In re Goodal (1885) 64 Wis. 210, 25 N. W. 30.

[19] Smith v. Smith (1897) 70 Mo. App. 448; Appeal of Watson (1889) 125 Pa. St. 340, 17 Atl. 426.

[20] Lent v. Howard (1882) 89 N. Y. 169; Carney v. Kain (1895) 40 W. Va. 758, 23 S. E. 650.

[1] Moulin v. Columbet (1863) 22 Cal. 508; Murdock v. Murdock (1857) 7 Cal. 511, 513.

[2] Page v. Page (1905) 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510; 133 Am. St. Rep. 250n.; Williams v. Williams (1902) 114 Wis. 79, 89 N. W. 835.

[3] Woodward, The Law of Quasi-Contracts, p. 84.

[4] Page v. Page (1905) 73 N. H. 305, 61 Atl. 356, 6 Ann. Cas. 510.

[5] (Dec. 27, 1918) 28 Cal. App. Dec. 31, 33, 178 Pac. 734, 736.

between these parties, for where there is 'blood relationship' between the parties, it may well be inferred, in the absence of a direct understanding to the contrary, that pecuniary compensation was not expected by the one performing the services." The impression given by the use of the words "direct understanding" is that an express contract will be required. Is this true? Should this principle be extended so generally? Does the fact that people are related infer gratuities? A close relationship might be evidence of gratuity, but it would have to be considered along with the kind of service rendered and the other circumstances.

The statement of the court that pecuniary compensation is not expected by the one performing services where there is blood relationship certainly does not apply in the face of attendant circumstances where payment would ordinarily be presumed. Blood relationship in itself, in view of the modern tendency of relatives to shift for themselves, and away from the old relation of the family, should be but slight evidence, limited to a close degree of relationship or to the family relation. The real question is whether the parties intended to contract or not. In the case of parent and minor child the court's statement may apply quite generally; but here there is the family or domestic relationship, as well as the obligation attached to the relation. No implied contract would ever be raised to pay in such a case in the face of the duties required by the relation. Likewise, in the case of husband and wife[6] no presumption of payment for ordinary services rendered will be raised; not because of any blood relationship between them, for none exists, but because of the family relationship. It is clearly apparent in these cases that it is not a question of blood relationship at all. Between parent and minor child, husband and wife, there is something more than a mere family relationship. There is a duty required because of certain positive rules of law; because of the status which gives each the right to certain services from the other.

An examination of the decisions will reveal that the majority of cases in which the presumption of gratuities has been given effect have been between children and their parents or the representatives of the parent's estate.[7] It includes the case of services rendered by an adopted member of the household, or by a step-child.[8] In all these cases thus far mentioned it may be

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[6] Gjurich v. Fieg (1913) 164 Cal. 429, 432, 129 Pac. 464; Murdock v. Murdock (1857) 7 Cal. 511; Crane v. Derrick (1910) 157 Cal. 667, 109 Pac. 31; Lapworth v. Leach (1889) 79 Mich. 16, 44 N. W. 338; In re Cooper (1894) 27 N. Y. Supp. 425; Coons v. Coons (1907) 106 Va. 572, 56 S. E. 576.

[7] Woodward, Quasi-Contracts, p. 83; Curry v. Curry (1886) 114 Pa. St. 367, 7 Atl. 61; Horton's Appeal (1880) 94 Pa. St. 62.

[8] Andrus v. Foster (1845) 17 Vt. 556; Hogg v. Laster (1892) 56 Ark. 382, 19 S. W. 975; Martin v. Martin's Estate (1900) 108 Wis.

said that there is truly a quasi-contractual relationship, in which the intention of the parties is entirely disregarded. The law is the same as to adults where the child continues after minority to live with its parents, that is, to board and reside with them, and to render and receive services. There is then no implied pecuniary obligation on either side;[9] although at this step the former positive obligations incidental to the relationship cease to exist. Likewise, the presumption which may be said to exist because of the continuation of the family relationship, may now be rebutted by facts and circumstances as well as an express agreement that they did not intend such services to be gratuitous. If the circumstances show that it must have been the expectation of both parties that he should receive compensation, a promise will be implied.[10] The nature of the service in such cases should be the deciding factor. The presumption of gratuities should not be applicable unless the services in question were such as are commonly rendered or are required as an incident of the family relationship. This view has, however, not been endorsed by any of the courts, though some authorities distinguish between services which are and those which are not of a personal nature.[11] The courts make a distinction between cases where the child has come of age, been away from home, supported himself and then returns upon the request of the parent; and those where the child has continued to live with the parent after arriving at age and has never had any other home.[12]

Beyond these relationships of parent and child, husband and wife, one passes from the quasi-contractual to the contractual basis in which the real intention of the parties is the essence of the transaction. Assuming that brothers and sisters, cousins, aunts and nieces, uncles and nephews are living together in a family group, it is even more necessary to look to the intention of the parties serving, before it can be said that the mere blood relationship will raise a presumption of mutual gratuities.[13] If they are not living together there should be no presumption whatever. It may be conceded that there can be no recovery for

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284, 84 N. W. 439; Fuller v. Fuller's Estate (1898) 21 Ind. App. 42, 51 N. E. 373; Neal v. Gilmore (1875) 79 Pa. St. 421; Holmes v. Waldron (1893) 85 Me. 312, 27 Atl. 176; Walker v. Taylor (1901) 28 Colo. 233, 64 Pac. 192; Graham v. Stanton (1901) 177 Mass. 321, 58 N. E. 1023.

[9] Friermuth v. Friermuth (1873) 46 Cal. 42, 45; Wall v. Wall (1896) 69 Ill. App. 389.

[10] Andrus v. Foster, supra, n. 8; Story v. Story (1891) 1 Ind. App. 284, 27 N. E. 573; Broderick v. Broderick (1886) 28 W. Va. 378; Price v. Price's Exr. (1897) 101 Ky. 28, 39 S. W. 429; Stafford v. Devereux (1895) 166 Pa. St. 277, 31 Atl. 87.

[11] Frailey Adm'r v. Thompson (1899) 20 Ky. L. Rep. 1179, 49 S. W. 13.

[12] Marion v. Farnan (1893) 68 Hun (N. Y.) 383, 22 N. Y. Supp. 946.

[13] Fuller v. Mowry (1893) 18 R. I. 424, 28 Atl. 606; Morrissey v. Faucett (1902) 28 Wash. 52, 68 Pac. 352.

services rendered with no idea of remuneration,[14] that is, for the ordinary exchange of gratuities among those living in a family relationship; or for services rendered with an express assurance that there would be no charge therefor.[15] But the presumption of gratuitous services among those living in the family relation must be qualified to this extent, that if the circumstances in which the services are rendered are such as to show a reasonable and proper expectation that compensation is to be made, plaintiff will be entitled to recover even in the absence of an "express" contract.[16] This presumption should not be peculiar to blood relatives but should go back to the contractual intention. Is the service rendered something which exists in the ordinary family relationship or something the parties would intend to contract about? Whenever the contractual relation is established, dependent on the kind of services rendered, whether the parties be blood relatives or not, the contract should be given effect. Of course, the presumption of gratuities is more easily rebutted as the degree of relationship diminishes, but the argument is that it should not exist, as the authorities hold it does exist, in the case of aunts and nieces, brothers and sisters, and other close relatives.[17] Such relationships should not of themselves rebut the legal presumption of an implied contract arising from services rendered.

It is quite apparent, then, that certain persons living in a family relationship do certain things gratuitously. This is ordinarily confined to the pure family relation and services would be such as are ordinarily gratuities. Blood relationship is involved only because as a general rule those in the family relation are blood relatives, and a false conclusion, making a general application of the presumption of gratuities in all cases of blood relationship, has followed from this. It could not be said today that blood relatives ordinarly live in a family relationship, and, therefore, no presumption should exist from such proof alone.

M. H. V. G.

SALES: LIABILITY OF EATING HOUSE KEEPER FOR WHOLESOMENESS OF FOOD SERVED TO GUESTS.—Plaintiff, in the case of *Loucks v. Morley*,[1] suffered a violent and protracted illness alleged to have been induced by eating unwholesome rice pudding served to him while a guest at defendant Morley's restaurant. The plaintiff did not allege negligence on the part of defendant, but based

[14] Gomez v. Johnson (1899) 106 Ga. 513, 32 S. E. 600.

[15] Cochran v. Zachery (1908) 137 Ia. 585, 115 N. W. 486; Castle v. Edwards (1895) 63 Mo. App. 564; Swires v. Parsons (1843) 5 Watts and S. (Pa.) 357.

[16] Disbrow v. Durand (1892) 54 N. J. Law 343, 24 Atl. 545; Carpenter v. Weller (1878) 15 Hun (N. Y.) 134.

[17] Hurst v. Lane (1898) 105 Ga. 506, 31 S. E. 135; Riley v. Riley (1893) 38 W. Va. 283, 18 S. E. 569.

[1] (Feb. 4, 1919) 28 Cal. App. Dec. 236, 179 Pac. 529.